IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. DONALD V. WATKINS, SR.; WATKINS PENCOR, LLC; MASADA RESOURCE GROUP, LLC; and DONALD V. WATKINS, P.C.; Defendants.	: : : : : : : : : : : : : :	CIVIL ACTION NO. 1:16-CV-3298-SCJ

ORDER

This matter appears before the Court on Defendants' Motion for a Preliminary Injunction. Doc. No. [20]. As relief, Defendants request that the Court (1) enjoin Plaintiff, the Securities and Exchange Commission ("SEC"), from pursuing the claims in this suit because they "are barred by the applicable statute of limitations," (2) enjoin Plaintiff from making public comments about this case, and (3) require Plaintiff to retract the public statement it made about this case because the lawsuit "has zero legal justification." Doc. No. [20], pp. 1–2, ¶¶1–3. The SEC filed its response on November 14, 2016 (Doc. No. [23]), and the Court held a hearing on the motion on January 12, 2017. This matter is now ripe for review. See Fed. R. Civ. P. 65(a)(1).

I. BACKGROUND

Between 2009 and 2014, Defendant Donald Watkins and the other Defendants, his companies, raised more than $6 million in investments relating to waste-to-energy conversion ventures ("the Masada Ventures") by Defendant Watkins Pencor, LLC and Defendant Masada Resource Group, LLC ("Masada"). Doc. No. [1], p. 1, ¶1. The funds were raised through the sale of two types of alleged securities: (1) "economic interest" agreements, and (2) promissory notes. Id. p. 9, ¶25.

The economic interests were sold in 2009 and 2010, and entitled the investors to 1% of the future cash distributions by the Masada Ventures in exchange for between $200,000 and $1,000,000. Id. ¶28. Although the economic interest agreements were "silent as to [the] use of proceeds," Defendant Watkins allegedly "represented to investors in other communications – both before and after their investments – that their money would be and had been used to fund Masada and the Masada Ventures." Id. p. 10, ¶30. In fact, Defendant Watkins allegedly used the investor funds for a wide variety of personal purposes totally unrelated to the Masada Ventures. See id. pp. 11–12, ¶¶35–39.

The promissory notes were entered into in 2010, but were renewed in 2011 and Defendants solicited at least one renewal in 2012. See id. pp. 16, 19, ¶¶58, 68. The promissory note stated it would be used "solely for business purposes," but

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Defendant Watkins allegedly used some of the money to make a payment on his personal airplane, pay his personal tax obligations, and pay his credit card bill. Id. pp. 12–13, 18–19, ¶¶41, 43, 64, 67.

Defendants also allegedly made material misrepresentations about the progress of purported discussions about a acquisition of the Masada Ventures by Waste Management, Inc. ("Waste Management"). See id. pp. 13–20, ¶¶47–72. In 2011, Defendants represented to investors that "Waste Management was looking to acquire certain of the Defendants and their affiliates," and that "the acquisition was likely to occur within several months' time." Id. p. 14, ¶48. In fact, any interest Waste Management had in the Masada Ventures "never progressed past an initial meeting that lasted only approximately 30–45 minutes," and was held in August 2012—over a year after Defendants began telling investors that Waste Management would acquire property of the Masada Ventures. Id. p. 16, ¶55. Nevertheless, in a September 2012 email, Defendant Watkins represented that the acquisition would be for $2–5 "billion in cash and stock," while he allegedly never received any indication that an acquisition would be valued in that range. Id. pp. 19–20, ¶¶70–71. As late as February 2014, Watkins allegedly "asked [an investor] for an additional $1 million investment into Masada" by representing that the entity was worth more than $1 billion and "claiming it was about to be acquired by a Saudi prince. Id. p. 20, ¶72.

II. LEGAL STANDARD

To be entitled to a preliminary injunction, a party must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the moving party unless the injunction issues; (3) that the threatened injury to the moving party outweighs the harm to the non-moving party if the injunction issues; and (4) that the injunction will not disserve the public interest. MacGinnitie v. Hobbs Grp., LLC, 420 F.3d 1234, 1240 (11th Cir. 2005). Because a preliminary injunction "is an extraordinary and drastic remedy" the movant must "clearly carr[y] the burden of persuasion" as to these elements. United States v. Jefferson Cty., 720 F.2d 1511, 1519 (11th Cir. 1983). A party's the likelihood of success on the merits is generally considered the most important element, and a failure to establish it "may defeat the party's claim, regardless of its ability to establish any of the other elements." Haitian Refugee Ctr., Inc. v. Christopher, 43 F.3d 1431, 1432 (11th Cir. 1995).

III. ANALYSIS

As a preliminary matter, the Court notes that a preliminary injunction is not the proper mechanism for the relief Defendants are requesting. An injunction is only available if the movant can "make a showing that some independent legal right is being infringed." Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1098 (11th Cir. 2004). Defendants make no argument that any independent legal right is being

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infringed. See Doc. No. [20]. Instead, they are asking the Court to "enjoin" Plaintiff from pursuing its claims based on their affirmative defenses. Id. p. 2, ¶3; see also id. p. 4. Defendants are, in essence, asking the Court to dismiss this case without filing a motion to dismiss or a motion for judgment on the pleadings.[1] Defendants cannot circumvent the proper channels by attempting to get their relief in the form of a "preliminary injunction." In any event, Defendants' motion for a preliminary injunction fails on its merits.

A. Likelihood of Success on the Merits

Defendants put forth three affirmative defenses that they argue entitle them to injunctive relief: "(1) Plaintiff is barred by the statute of limitations; (2) fundamental principles of contract interpretation extinguish Plaintiff's claims; and (3) the ***entire set of material facts***, as applied to each claim by Plaintiff, demonstrates that none of Plaintiff's alleged fraud claims against Defendants ever occurred." Doc. No. [20], p. 4 (emphasis in original). The Court addresses each of these defenses in turn.

Defendants' argument that "[a]ll of the SEC's claims are barred by the applicable five year statute of limitations" fails. See id. pp. 15–18. This argument

[1] The Court notes that Defendants have filed a motion for judgment on the pleadings. Doc. No. [12]. As the Court will discuss in greater detail below, the very fact that Defendants have this adequate remedy at law demonstrates that they are not entitled to a preliminary injunction.

appears to deal only with the "purchase agreement[s]" relating to the sale of economic interests, which concluded in 2010. See id. p. 16. Defendants do not discuss the promissory note investments, which were initially entered into in 2010, but were renewed in 2011 and Defendants solicited at least one renewal in 2012. See id. pp. 15–18; see also Doc. No. [1], pp. 16, 19, ¶¶58, 68. Because it appears from the complaint that the promissory notes had to be renewed on an annual basis, even if the claims relating to the sale of economic interests were barred by the statute of limitations, the claims relating to the promissory notes would not be.

Additionally, Watkins allegedly made material misrepresentations when he "asked [an investor] for an additional $1 million investment into Masada" in 2014. See Doc. No. [1], p. 20, ¶72. Defendants argue that the Court should not consider the alleged 2014 conversation when deciding on the statute of limitations issue because "no actual transaction took place." See Doc. No. [27], p. 2. However, 15 U.S.C. § 77q(a)(1) prohibits fraud not only in the sale of securities, but in the "offer" of securities. 15 U.S.C. § 77q(a)(1). Thus, even though the investor did not agree to purchase the security, the allegations still establish a violation of § 77q(a)(1) within the statute of limitations period. Doc. No. [1], p. 20, ¶¶72–73.

In any event, Defendant's argument that Plaintiff's claims are "barred" by the statute of limitations is grossly misleading. Even if all claims for civil penalties and disgorgement were barred by the statute of limitations, the SEC could still pursue its claim for injunctive relief to prevent recurring violations. SEC v. Graham, 823 F.3d. 1357, 1360 (11th Cir. 2016). Defendants argue that the SEC should not be allowed to pursue injunctive relief, because it does not present sufficient evidence to demonstrate a possibility of recurring violations. See Doc. No. [20], p. 18. But the fact that the SEC may not yet have evidence to demonstrate a possibility of recurring violations is hardly surprising. Discovery has not even begun in this case. Defendants seek to have this case dismissed because Plaintiff lacks evidence to prove its case before Plaintiff has had any opportunity to obtain the evidence to prove its case. This the Court will not do. The allegations in the complaint are more than sufficient, at this stage, to demonstrate a possibility of recurring violations. See Doc. No. [1], pp. 16, 19–20, ¶¶58, 68, 72–73.

Defendants also argue that the "plain language of the purchase agreements" negates any fraud claim by the SEC. Doc. No. [20], pp. 5–8.[2] As an initial matter, this argument also only deals with the "purchase agreements," which stated that the investors were "purchasing a defined percentage of the economic interests" and were silent as to the use of proceeds. See Doc. No. [20], p. 7; see also Doc. No. [1], p. 10, ¶30. Again, even if Defendants were correct that the plain language of the economic interest agreements negates a fraud claim, the Court could still not dismiss the case because the promissory notes explicitly stated that they would be used "solely for business purposes," and Defendant Watkins allegedly used some of the money to pay various personal debts. See Doc. No. [1], pp. 12–13, 18–19, ¶¶41, 43, 64, 67.

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[2] Defendants do not appear to be arguing that the economic interests do not qualify as "securities," but even if they were that argument would fail. See Villeneuve v. Advanced Bus. Concepts Corp., 730 F.2d 1403, 1404 (11th Cir. 1984). The money was paid into a common venture in exchange for the right to receive a percentage of future cash distributions. Doc. No. [1], p. 9, ¶28. The money was described in the contracts as an "investment," and the investors' profits were dependant on Defendants' efforts. See id. p. 10, ¶29.

Defendants' argument that the "plain language" of the economic interest agreements negates any fraud claim also fails because a finding of fraud depends on "the total mix of information" given to investors. See SEC v. Morgan Keegan, 678 F.3d 1233, 1250-51 (11th Cir. 2012). This includes oral statements made to investors, and the contents of the written documents given to investors is not determinative. Id. As noted above, the SEC admits that the economic interest agreements were "silent as to [the] use of proceeds." Doc. No. [1], p. 10, ¶30. But the SEC also alleges that Defendant Watkins "represented to investors in other communications – both before and after their investments – that their money would be and had been used to fund Masada and the Masada Ventures." Id. These allegations, that Defendant Watkins told investors that their funds would be used for business purposes when they were in fact used for personal purposes, are sufficient to maintain a claim of fraud. See id.

pp. 11–12, ¶¶35–38. Regardless of what the economic investment agreements said, a finding of fraud depends on "the total mix of information" given to investors. Morgan Keegan, 678 F.3d at 1250-51.

Finally, Defendants make a variety of assertions with regard to their argument that "no rational jury would conclude as a whole that fraud occurred under the facts known to the SEC." See Doc. No. [20], pp. 8–15. For example, Defendants point out that they "directed and undertook a litany of market-driven activities that exponentially increased the overall economic value of Masada's waste-to-energy global business enterprise." Id. p. 12–13. But this is wholly irrelevant to the issue of whether Defendants committed fraud in connection with the offer or sale of securities. See 15 U.S.C. § 77q(a)(1). The SEC need only prove that Defendants knowingly made material misrepresentations, not that the misrepresentations caused any harm to the investors. See Morgan Keegan, 678 F.3d at 1244. Likewise, Defendants argue that the SEC cannot bring a fraud claim because one of the promissory note investors has not complained about the way in which the funds were used. See Doc. No. [20], p. 15. Again, there is no requirement that the SEC demonstrate that an investor has complained in order to succeed on a claim of securities' fraud. See Morgan Keegan, 678 F.3d at 1244.

Defendants also argue that the fraud claim relating to certain of the promissory note investments fails because of the "indisputable fact that the expenditure of the subject loan money was absolutely consistent with communications between Watkins and [the investor]." Doc. No. [20], p. 15. But the SEC plausibly alleges that Defendants knowingly made a material misrepresentation with respect to the promissory note investments. The note stated it would be used "solely for business purposes," and Defendant Watkins used some of the money to make a payment on his personal airplane, pay his personal tax obligations, and pay his credit card bill. Doc. No. [1], pp. 12–13, 18–19, ¶¶41, 43, 64, 67. Defendants' argument that the use of the funds was consistent with the investor's understanding is a factual dispute that cannot be resolved before discovery. More importantly, Defendants never even address the most serious allegations of misrepresentations. The SEC alleges that, in connection with the sale and renewal of the promissory notes, Defendants made material misrepresentations about the progress of purported discussions about an acquisition by Waste Management. See id. pp. 13–20, ¶¶47–72. If these allegations are proved, Defendants may have committed fraud regardless of whether the particular use of the investor's funds were consistent with the investor's understanding.

Because Defendants are unlikely to succeed on the merits of any of their affirmative defenses, the Court could deny the preliminary injunction for that reason alone. See Haitian Refugee Ctr., Inc., 43 F.3d at 1432. Nevertheless, the Court examines the balance of the other elements in this case.

B. Irreparable Harm to Defendants

Defendants argue that they will suffer irreparable injury if an injunction does not issue because this lawsuit is causing them to lose their "business goodwill" and to lose out on various business opportunities. See Doc. No. [20], pp. 24–25. During the hearing, Defendant Watkins noted that he is in danger of losing his bar license, allegedly due to the SEC's allegations in this lawsuit. As an initial matter, the Court notes that Defendant Watkins is currently suing the Federal Deposit Insurance Corporation ("FDIC") because the FDIC is investigating Defendant Watkins for alleged violations of Regulation O, 12 C.F.R. § 215, *et seq*. See Watkins v. Federal Deposit Insurance Company, Case No. 1:16-CV-4557, Doc. No. [1]. Thus, while Defendants argue that any injury they are suffering is due to the allegations by the SEC in this suit, the record is unclear because the alleged injuries may also be caused by the FDIC's investigations into Defendant Watkins' alleged violations of Regulation O. In any event, Defendants cannot show an irreparable injury because they have an adequate remedy at law.

Although generally phrased simply as a showing of an "irreparable injury," to receive an injunction the movant must demonstrate "an injury for which there is no

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adequate legal remedy **and** which will result in irreparable injury if the injunction does not issue." Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1127 (11th Cir. 2005) (emphasis added). As the Court noted above, the extraordinary remedy of an injunction is not appropriate in this case. Defendants are asking the Court to "enjoin" Plaintiff from pursuing its claims based on their affirmative defenses. Doc. No. [20], p. 2, ¶3; see also id. p. 4. But Federal Rule of Civil Procedure 12 provides Defendants with multiple legal remedies if they feel that Plaintiff should not be allowed to pursue its claims. They could move to dismiss the case for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). They could receive a judgment on the pleadings by making a showing that "plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations." See Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs, Ga., 831 F.3d 1342, 1345 (11th Cir. 2016); see also Fed. R. Civ. P. 12(c). What they cannot do is ask the Court to "enjoin" Plaintiff from pursuing its claims. See Alabama, 424 F.3d at 1127.

Defendants' are arguing that they will suffer irreparable injury by having to defend this case. But this kind of "injury" occurs any time anyone is sued by anyone else. The remedy for this "injury" is not an injunction, but the adequate legal remedies established by law. See Fed. R. Civ. P. 12(b)(6); id. 12(c); see also Alabama,

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424 F.3d at 1127. The very case cited by Defendants, for the proposition that they have the right to move for an injunction, establishes that an injunction is an improper remedy in this case because Defendants have an adequate remedy at law. See Doc. No. [20], p. 3; see also Ranzy v. Single N Corp., No. CIV.A. H-09-3334, 2011 WL 864908, at *4–5 (S.D. Tex. Mar. 10, 2011). In Ranzy, the defendant asked the court for an injunction preventing the plaintiff from prosecuting the case as a class action. 2011 WL 864908, at *2–3. As the court in that case noted, the defendant had an adequate remedy because, "[i]f the defendants prevail on their argument relating to the enforceability of the contractual waivers, the class will never be certified."). Id. at *5. The court then concluded that "the potential injury is not irreparable" and denied the motion for a preliminary injunction. Id. Likewise, if Defendants prevail on their pending motion for judgment on the pleadings, this case will be dismissed. See Doc. No. [12]. The injury they complain of is, thus, not irreparable. See Alabama, 424 F.3d at 1127; see also Ranzy 2011 WL 864908, at *5.

C. Balance of Potential Harms and the Public's Interest

Defendants nowhere discuss one of the essential elements they must prove in order to receive a preliminary injunction: whether "the threatened injury to the moving party outweighs the harm to the non-moving party if the injunction issues." See Doc. No. [20]; see also MacGinnitie, 420 F.3d at 1240. As discussed above, there

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is no threat of an irreparable injury to Defendants. Plaintiff, on the other hand, would suffer greatly because it would be prevented from conducting any discovery needed to prove its case solely on the basis of Defendants' arguments that they believe Plaintiff is unlikely to succeed. With respect to the public's interest, "Defendants argue that no public interest can be greater than stopping a federal agency from abusing its power." Doc. No. [20], p. 20. While this may be true, the Court concluded above that the SEC presents plausible allegations of fraud in this case. The SEC is, thus, doing precisely what it is supposed to do: investigate and prosecute potential securities' fraud. Far from disserving the public interest by abusing its power, the SEC is serving the public interest by pursuing a case that it feels is necessary to correct securities' fraud and prevent such fraud from occurring in the future.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for a Preliminary Injunction (Doc. No. [20]) is **DENIED**.

IT IS SO ORDERED, this 20th day of January, 2017.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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